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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 142

JAY LEE GIBSON, *Petitioner*

v.

GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, *Respondent*

MOTION FOR REHEARING

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TO THE JUDGES OF SAID HONORABLE COURT:

Comes now GUY A. THOMPSON, TRUSTEE, NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY, RESPONDENT in the above styled and numbered cause and files this his motion for Rehearing and as grounds therefor would respectfully show unto the Court as follows:

I.

This Court erred in holding that "the proofs justified with reason the jury's conclusion that employer's negligence played a part in producing the petitioner's injury."

II.

This Court erred in reversing the Judgment of the Supreme Court of Texas.

III.

This Court erred in reversing the Judgment of the Supreme Court of Texas without oral argument and without proper submission of the case on the merits.

Point I Restated

This Court erred in holding that "the proofs justified with reason the jury's conclusion that employer's negligence played a part in producing the petitioner's injury."

Point II Restated

This Court erred in reversing the Judgment of the Supreme Court of Texas.

Argument

This Honorable Court by its opinion rendered herein October 21st has held that the proofs justified with reason the jury's conclusion, without stating its reasoning or pointing out the evidence which this Court considered sufficient to raise the issue. It is, of course, exceedingly difficult to point out wherein this Court erred when there is no way to ascertain what evidence or testimony this Court relied upon in making its decision.

We are firmly convinced that the theories of negligence upon which Petitioner relied are without merit. The decision to pack or not to pack the ground was one involving engineering judgment. Surely this Court is not substituting its own opinion for that of competent engineers. And surely this Court does not mean for a jury, at their whim, to upset the plans of competent engineers. To allow either result will penalize anyone who plans to erect a major improvement. Certainly in this era of technological advancement, our major industries should be encouraged to follow the direction and judgment of the respective experts, licensed engineers and architects.

The fact that there were some rocks larger than two inches in the yard is wholly immaterial since such did not contribute to Plaintiff's fall. By no stretch of the testimony could it be considered that the presence of such rocks was material in this cause. It should be remembered that Petitioner's own witness testified that the rocks were just regular railroad gravel.

Likewise, Petitioner's theory that 900 feet—not quite one-fifth of a mile—was too far for him to walk is absurd. The theory that a special path should have been built for him is without merit. Since it would be impossible to use a straight line, because of the switching on the intervening tracks, this special path would have covered the entire yard.

For a more complete answer to Petitioner's Arguments, we respectfully refer to pages ten to twenty-one of Respondent's Reply to Petitioner's Application for a Writ of Certiorari.

This Court by its decision in this case has completely changed the fundamental rule which has served this nation so well for many years. It has changed this nation from one ruled by law to one ruled by men. There is no provision in the Federal Employer's Liability Act requiring all cases to be submitted to a jury. When Congress first passed the Act and when it was last Amended, the decisions held that the trial judge's role was of meaningful significance. It seems strange that many, many years later this Court should place a different interpretation upon the Act.

The criterion for liability under the Act was fixed by Congress when it first passed the Act. That criterion has not been changed by Congress, and has been and still is, whether or not the Defendant was negligent. As Mr. Justice Harlan points out in his dissent in *Rogers v. Missouri Pacific Railroad Company*, 352 U.S. 500, up until the decision of that case it had been required that a verdict be based upon evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence. By what authority this Court undertook to change the test many years after Congress established the criterion, this Court does not state. What this Court overlooked in the *Rogers Case, Supra*, and subsequent cases, is that Congress did not strip the Defendant of the Defense that he was not negligent. On the issue of negligence, the Congress retained the Common Law standard of due care. And on the issue of negligence vel non an Action of this sort is no different from the Ordinary common law negligence action. We are certain, and we submit that this Court is convinced, that there is no evidence in this record to support a finding of negli-

gence against this Defendant, using the standard set by Congress. It should be remembered that it is the province of Congress and not this Court to set such standard. Such action on the part of this Court constitutes an unwarranted interference into the prerogatives of the Congress and establishes the prevailing notions of social justice of the Court as the standard at any given moment.

Point III Restated

This Court erred in reversing the Judgment of the Supreme Court of Texas without oral argument and without proper submission of the case on the merits.

The procedure followed by this Court in the instant case makes a mockery of the judicial system of the State of Texas. It casts aside the unanimous opinion of the nine members of the Supreme Court of Texas, reached after briefs on the merits of the case had been filed, oral argument had been heard, and the case had been carefully and thoroughly considered. The action of this Court in summarily reversing the judgment of the Supreme Court of Texas without a hearing, without the filing of briefs, except those relating to the granting of the Writ, without the printing of the record and without a full consideration of the matter is something considerably less than the standard of fair play, of which the American Judicial System prides itself.

The business which comes before this Court is of a different character than that which comes before the State Supreme Courts. The State Courts handle a greater number of negligences cases of this character than does this Court. They are more familiar with and have had a larger oppor-

tunity to become better trained with respect to the technical as well as the practical aspects of such cases than is this Court. We are firmly convinced that if this Court would give full consideration to this case, as was given by the Supreme Court of Texas, it would reach the same conclusion as did that Court and would not reverse the unanimous opinion of the Supreme Court of Texas. For a bare majority of this Court to reverse a unanimous judgment of a State Supreme Court, which is much more familiar with the issues at hand than is this Court without full consideration of the whole record and without oral argument is inconsistent with the philosophy of our jurisprudence.

In this day of widespread learning, any American of any of these United States can with pride contemplate that the members of the Supreme Court of his state are able jurists, who came as learned and trained practitioners to the bench, and it would not, today, be inept to assume that the members of the Supreme Court of Texas, from the standpoint of general knowledge, legal training, and judicial experience and concept, would compare favorably with the members of any court that ever convened in this land of ours.

FOR THIS COURT to grant a Writ of Certiorari, and on the mere application therefor to set aside the considered opinion of the Supreme Court of Texas, or of any other State of the Union, is to shake the foundation of both our state and national judicial system. To tear down the one is not to make strong the other.

WHEREFORE, premises considered, Respondent prays that this motion be granted and that the judgment rendered

herein October 21, 1957, be set aside, that the record be printed and that the cause be set down for oral argument and submission.

Respectfully submitted,

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